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NATIONSTAR MORTGAGE LLC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

12 ALFRED ZAKLIT AND JESSY
13 ZAKLIT, individually and on behalf of
all others similarly situated,

14 | Plaintiffs.

15 || VS.

16 NATIONSTAR MORTGAGE LLC and
17 DOES 1 through 10, inclusive, and each
of them.

18 | Defendants

Case No. 5:15-CV-02190-CAS-KK

NATIONSTAR MORTGAGE LLC'S RESPONSE TO MOTION FOR APPROVAL OF CLASS NOTICE

Date: March 12, 2018
Time: 10:00 a.m.
Ctrm.: 8D
Judge: Hon. Christina A. Snyder

Action Filed: October 23, 2015

Defendant Nationstar Mortgage LLC has no opposition to plaintiffs Alfred and Jessy Zaklit's motion for approval of class notice to the extent it seek approval of the form and content of the notice. As ordered by the Court, the parties met and conferred regarding the form of the notices and agreed on their terms.

24 However, Nationstar does oppose the motion to the extent it seeks an order
25 requiring Nationstar to produce a class list. Having proposed their class definition
26 for the first time in their reply brief in support of the motion for class certification,
27 plaintiffs have not conducted sufficient discovery to ascertain persons who fall
28 within that class. Because the information that plaintiffs have uncovered in

1 discovery thus far is overbroad and does not match the class definition, they ask the
 2 Court to order Nationstar “to produce, within a reasonable time frame, tailored data
 3 for the phone calls that fit within the class definition” *See* Dkt. no. 83-1 at 6; *see*
 4 *also* Dkt. no. 83-4. Awarding that relief on this motion would be improper for at
 5 least three reasons.

6 First, plaintiffs never met and conferred about the issue in violation of Local
 7 Rule 7-3. Not once during the parties’ discussions about this motion did plaintiffs
 8 ever say they would also be seeking an order requiring Nationstar to produce a class
 9 list. Plaintiffs’ failure to meet and confer on this issue is in itself sufficient reason to
 10 deny the motion to the extent it seeks production of a class list. *See, e.g., Walter v.*
 11 *W. Indus. Inc.*, No. SACV1301503JLSANX, 2015 WL 12683787, at *1 (C.D. Cal.
 12 Feb. 25, 2015); *Alcatel-Lucent USA, Inc. v. Dugdale Commc’ns, Inc.*, No. CV 09-
 13 2140PSGJCX, 2009 WL 3346784, at *4 (C.D. Cal. Oct. 13, 2009)

14 Second, plaintiffs cite no authority requiring the production of a class list on
 15 this motion. Plaintiffs’ motion is based on Fed. R. Civ. P. 23(c), but nothing in that
 16 rule addresses identification of class members or requires the production of a class
 17 list. Plaintiffs cite no other authority permitting the relief they seek. Instead, the
 18 rules leave identification of class members, like all factual issues, to be resolved
 19 through discovery and investigation.

20 Third, plaintiffs advance no reason why this issue cannot be addressed
 21 through discovery and investigation. As plaintiffs acknowledge, *see* Dkt. no. 83-1 at
 22 6, n. 1, they have recently served discovery asking Nationstar to identify class
 23 members. Nationstar intends to respond to the discovery in good faith, but there are
 24 certain elements of plaintiffs’ class definition that cannot be identified from its
 25 records. Accordingly, while Nationstar intends to provide plaintiffs with a list of
 26 borrowers based on the information it can glean from its records, that list will
 27 necessarily be overbroad and not reflect the actual class list.

28 For example, the class definition is limited to borrowers who received

1 outbound calls from Nationstar “while physically present in California and using a
 2 cellular device ...” *See* Dkt. no. 74 at 24. Nationstar has no way of knowing where
 3 any borrower was located when an outbound call to a cellular phone was placed.
 4 While Nationstar may have residential addresses for some borrowers, proof of
 5 address is not proof of location, as the Ninth Circuit recently confirmed in a similar
 6 call recording case. *See Brinkley v. Monterey Fin. Servs., Inc.*, 873 F.3d 1118, 1122
 7 (9th Cir. 2017) (holding call recipients’ addresses were insufficient to prove they
 8 were “located in” California when calls were made).

9 Though Nationstar has no way of determining where any borrower was
 10 located when a call was made, plaintiffs have represented that they have a solution.
 11 Their expert, Gerald Borlin, has opined “upon obtaining cell site location
 12 information for the cell phone calls at issue” from cell phone carriers, he could
 13 determine whether a call was received in California. *See* Dkt. no. 35-3 [Borlin
 14 Decl., ¶¶ 25-26]. Thus, according to plaintiffs’ representations, they should be able
 15 to take the overbroad list Nationstar ultimately produces and identify which
 16 borrowers were physically present in California when calls to their cellular phones
 17 were placed.

18 It is premature for the Court to issue a blanket order requiring Nationstar to
 19 identify class members on this motion, before the parties’ discovery and
 20 investigation on the issue is complete. Nationstar has not yet served its responses to
 21 plaintiffs’ discovery. Plaintiffs’ expert has not yet attempted to determine
 22 borrowers’ locations from cellular tower data. Any disputes about the extent to
 23 which class members can be identified from Nationstar’s records should be resolved
 24 on a more complete record and after the parties have exhausted all efforts to resolve
 25 the matter informally.

26 For the reasons stated, Nationstar does not oppose plaintiffs’ motion to the
 27 extent it seeks the Court’s approval of the form and content of the class notice. But
 28 to the extent that plaintiffs seek an order requiring Nationstar to identify class

1 members, the motion should be denied.

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3 DATED: February 16, 2018

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By: /s/ Erik Kemp

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Erik Kemp

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Attorneys for Defendant NATIONSTAR
MORTGAGE LLC

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